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Insurance—Rescission of Automobile Insurance Policy Procured by Fraud

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trial judge declared: "I instruct you that as a matter of law Officer Davies [the agent of the defendant] did in fact assault and falsely arrest and imprison plaintiff. Therefore, the only question remaining for you to determine is whether these acts were committed within the scope of Davies' employment as a Housing Authority Officer."[92] The Appellate Division, in reversing the trial court on the basis of the incorrect charge, declared that the defendant's resting did not necessarily amount to a concession of the facts establishing liability.[93] In addition, even though the testimony of an interested witness is not impeached or contradicted, the fact that he is interested places a cloud upon the truthfulness or accuracy of the testimony. The jury should be entitled to pass on the issue of credibility.[94]

The Court of Appeals approved the charge of the trial court and reversed the decision of the Appellate Division in the instant case. Where the evidence presented by the interested party "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness."[95] The Court held that the testimony of the plaintiff fulfilled these requirements and, in addition, was corroborated by a disinterested observer; therefore, the issues as to assault, false arrest and false imprisonment were properly taken out of the domain of the jury.[96]

In order to substantiate further its opinion, the Court relied on the presumption that arrest and imprisonment without a warrant are unlawful and the burden of producing evidence to rebut the presumption is on the defendant.[97] As the defendant offered absolutely no evidence to rebut the presumption, and as the trial judge believed that no reasonable jury could possibly find for the defendant, the plaintiff was entitled to a directed verdict on these issues.

Bd.

INSURANCE

Rescission of Automobile Insurance Policy Procured by Fraud

Under Article 6 of the Vehicle and Traffic Law, effective in April 1956, no motor vehicle can be registered in New York State without a certificate of insurance or evidence of a financial security bond.[1] This article further provides

92. Respondent's Brief, 7345 Cases & Points, Case 6, p. 9.
93. 11 A.D.2d 329, 205 N.Y.S.2d 443 (1st Dep't 1960).
94. Kavanagh v. Wilson, 70 N.Y. 177 (1877); 6 Carmody-Wait, New York Practice, pp. 713-714 (1953).
95. Hull v. Littauer, 162 N.Y. 569, 572, 57 N.E. 102, 103 (1900). See also Der Ohannessian v. Elliot, 233 N.Y. 326, 135 N.E. 518 (1922).
96. See N.Y. Civ. Prac. Act § 457-a(1).
97. Clark v. Nannery, 292 N.Y. 105, 54 N.E.2d 31 (1944); Bonnau v. State, 278 App. Div. 181, 104 N.Y.S.2d 364 (4th Dep't 1951), aff'd, 303 N.Y. 721, 103 N.E.2d 340 (1951).

1. N.Y. Vehicle and Traffic Law, art. 6, § 312.

that no insurance policy for which a certificate of insurance has been issued shall be terminated by cancellation until 20 days after a notice to terminate has been mailed to the insured.[2] The policy behind Article 6 as provided by the Legislature is the protection of innocent victims of motor vehicle accidents.[3]

Bearing the above in mind, we can now turn to the principal case of *Aetna Casualty and Surety Company v. O'Connor*[4] where the Court of Appeals was faced with the problem of determining the method of terminating a policy of insurance issued under the Assigned Risk Plan.

The Assigned Risk Plan was promulgated by the Superintendent of Insurance under the power granted him by the Insurance Law.[5] The plan as promulgated was mandatory on all insurance companies writing automobile insurance in New York. They were required to issue insurance policies to persons who are bad risks but otherwise entitled to insurance.

In the *O'Connor* case, insurance had been obtained on June 8, 1955, under the Assigned Risk Plan through fraud on the part of the insured. On March 4, 1956, O'Connor was involved in an accident causing personal injuries and property damage to the defendants, Millie and Perley Hamilton. Upon notification of the accident, Aetna investigated and discovered the prior fraud. They then elected to rescind the policy, and brought this action for declaratory judgment against the defendants. The Court of Appeals held, as did the courts below,[6] that although under the plan Aetna had a right to cancel, it did not have the right to rescind.

The plaintiff argued that since its right to rescind was a common law right, the right could be taken away only by a clear declaration to that effect. They based their argument on the theory that a statute in derogation of the common law must be strictly construed.[7] The Court agreed that the case depended on the construction to be given the plan, but stated that it called for a careful reading of the plan in the light of the circumstances surrounding its adoption and not for the "overly abstract principle of statutory interpretation" advocated by the plaintiff.

The Court reasoned that if it was a complete and comprehensive plan covering all the rights and duties of the parties, then the plaintiff's right would be lost if it was not provided for in the statute. The Court then examined the scope of the promulgations and the nature of the Assigned Risk Plan and decided that the insurer's only means of cancellation is by 10-days notice, as provided by the plan. They also pointed out that the insurer is really at fault for failing

2. N.Y. Vehicle and Traffic Law § 313.
3. N.Y. Vehicle and Traffic Law § 310.
4. 8 N.Y.2d 359, 207 N.Y.S.2d 679 (1960).
5. N.Y. Ins. Law § 63.
6. 8 A.D.2d 530, 190 N.Y.S.2d 795 (2d Dep't 1959).
7. The plaintiff failed to argue that the promulgations were unconstitutional as a delegation of the legislative power.

to make a thorough investigation, and that the ultimate beneficiary will not be the wrongdoer but will be the innocent victim.

The *O'Connor* case, as it effects an insurer's right to rescind under the Assigned Risk Plan, is really moot because Section 313 of the Vehicle and Traffic Law is all inclusive.[8] Therefore, it clearly supersedes the promulgations of the Superintendent of Insurance to the extent that they provide for cancellation. However, the *O'Connor* case is indicative of the present Court of Appeal's thinking on an insurer's right to rescind for fraud once an innocent third party has been injured by the insured. New Jersey and other jurisdictions have arrived at the same position under their Financial Responsibility Acts.[9]

A recent case in the Appellate Division, *Tetter v. Allstate Insurance Company*, held that the notice required in Section 313 of the Vehicle and Traffic Law had abolished the insurer's common law right to rescission *ab initio*, even though there was no injury to an innocent third party.[10] The court reasoned that to allow rescission *ab initio* would, one, make it impossible for the insured to comply with the statute (insured is required to have continuous coverage), and two, render him retroactively guilty of a misdemeanor (operating a motor vehicle without insurance coverage).

It would appear that the determining factor in this area is the fear that innocent victims of auto accidents may suffer. Although the *Tetter* case did not involve an innocent victim, to reverse the case on appeal the Court of Appeals would have to decide that the right to rescind was defeated only when an innocent third party was involved, and to indicate that his prior acts were lawful. To reverse, therefore, would require a strained interpretation of the statute. These two cases should give the insurance companies writing automobile liability insurance clear notice that once they issue the FS-1 form the only way they can terminate is by complying with the statute. This burden (prior investigation before issuance of the policy) imposed on the insurance companies is far down the scale of values when compared with the benefits to innocent victims and society as a whole.

R. E. N.

FOREIGN LIFE INSURER LICENSED IN STATE MAY CONTROL INSURANCE FIRMS ENGAGED IN NON-LIFE BUSINESS

In *Conn. Gen. Life Ins. Co. v. Superintendent of Ins.*, the Court of Appeals held that an out-of-state *life* insurance company licensed in New York can gain control of another company which deals in fire and casualty insurance and still maintain the privilege of issuing life insurance in New York.[11]

8. N.Y. Vehicle and Traffic Law § 313:
. . . every insurance policy for which a certificate of insurance (FS-1 form) has been issued.

9. Atlantic Casualty Insurance Company v. Bingham, 10 N.J. 460, 92 A.2d 1 1952; see also Annot., 171 A.L.R. 550 (1947) and 34 A.L.R.2d 1297 (1954).

10. 9 A.D.2d 176, 192 N.Y.S.2d 610 (4th Dep't 1959).

11. 10 N.Y.2d 42, 217 N.Y.S.2d 39 (1961).